

FINAL AWARD ALLOWING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 02-016782

Employee: Johnny Bradshaw
Employer: Ree's Contract Service (Settled)
Insurer: Indemnity Insurance Company of North America (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: February 22, 2002

Place and County of Accident: St. Louis County

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs of the parties, heard oral argument, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated December 11, 2006.

Preliminaries

The issue stipulated at trial was the liability of the Second Injury Fund.

The administrative law judge determined and concluded that employee sustained permanent and total disability as a result of the reported injury of February 22, 2002 alone. The administrative law judge found that the Second Injury Fund was not liable for permanent and total disability benefits.

A timely Application for Review with the Commission was submitted alleging that the award issued by the administrative law judge was erroneous in finding that the February 2002 injury alone caused employee to be permanently and totally disabled.

For the reasons set forth in this award and decision, the Commission reverses the administrative law judge's award.

Summary of Facts

The findings of fact and stipulations of the parties were recounted in the award of the administrative law judge; therefore, the pertinent facts will merely be summarized below.

Employee worked as a climber and trimmer for Bradshaw Tree Service. On February 22, 2002, employee suffered an injury to his neck at work. Employee testified that he was climbing a tree when he reached overhead and felt pain in his neck and right shoulder blade. Employee testified that he suffered a second injury to his lower back at work on April 12, 2002. Employee sought treatment from Dr. Galantz in May of 2002. Employee underwent physical therapy for six weeks. Employee had an MRI of the cervical spine on June 14, 2002 which revealed a disc herniation at C6-7. Dr. Albanna performed an anterior cervical fusion on August 9, 2002. He opined employee was at maximal medical improvement on January 6, 2003. Employee had three epidural steroid injections for ongoing symptoms beginning in August of 2003. After being released by Dr. Albanna, employee did not return to his work for Bradshaw Tree Service. Employee returned to work temporarily for a book shop, but testified that he could not continue working there due to anxiety dealing with people. Employee testified that he experiences panic attacks a few times a week.

Employee was referred to Dr. Guiley for a psychiatric evaluation on August 14, 2003. Dr. Guiley diagnosed employee with a psychiatric condition and prescribed medication. In January of 2004, employee sought treatment from Dr. Openlander. Employee was treated by both Dr. Guiley and Openlander for his anxiety and depression.

Employee settled with the employer for 20% permanent partial disability to the body due to his cervical injury on February 22, 2002.

Expert Opinions

Dr. Volarich opined that due to the primary injury employee suffered a permanent partial disability of 30% of the body as a whole referable to the cervical spine. He opined that employee suffered a 20% permanent partial disability due to his low back injury on April 12, 2002. Dr. Volarich concluded that employee was limited to light duty capacity as a result of his primary injury and that he suffered further disability due to his psychiatric condition. Dr. Liss, psychiatrist, found that employee suffered a 40% permanent partial disability due to anxiety and depression as a result of his work injury. Dr. Liss concluded that employee was unemployable due to his anxiety and depression.

Dr. Volarich opined that employee suffered 15% permanent partial disability referable to each wrist due to his pre-existing bilateral carpal tunnel syndrome. Dr. Volarich concluded employee suffered 25% permanent partial disability to the right elbow due to osteoarthritis that pre-existed his primary injury. Dr. Liss opined that employee suffered from attention deficit disorder (ADD) prior to February 22, 2002 even though he had neither been diagnosed nor received treatment for ADD prior to his primary injury. Dr. Liss opined employee suffered 25% permanent partial disability due to ADD pre-existing the February accident. Dr. Liss also assigned a 10% permanent partial disability due to pre-existing depression and anxiety.

Delores Gonzalez, vocational expert, evaluated employee on July 9, 2005, and found employee to be unemployable in the open labor market due to a combination of his orthopedic injuries and psychiatric condition.

Findings of Fact and Conclusions of Law

Upon careful review of the entire record, including the testimony, as well as the medical records offered and admitted into evidence, the Commission determines and concludes that the more believable evidence supports a finding that the combination of employee's pre-existing disabilities and his work-related injury render employee permanently and totally disabled.

"In order to be entitled to Fund liability, the claimant must establish either that (1) a preexisting partial disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself." *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo.App. W.D. 2004) citing *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 498 (Mo.App. W.D. 2001).

"Liability of the Second Injury Fund is triggered only 'by a finding of the presence of an actual and measurable disability at the time the work injury is sustained.'" *E.W. v. Kansas City School District*, 89 S.W.3d 527, 537 (Mo.App. W.D. 2002), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Dr. Liss and Dr. Volarich concluded employee suffered pre-existing measurable permanent partial disabilities. We find that employee has proven pre-existing measurable disabilities that were an obstacle to his employment.

Dr. Volarich noted disability to both upper extremities due to bilateral carpal tunnel syndrome, including lost motion as well as recurrent pain with repetitive motion. Employee's upper extremity limitations were specifically highlighted as an obstacle to his reemployment. Dr. Volarich testified that a combination of his disabilities created a substantial disability and based on his physical disabilities, he was permanently and totally disabled from any work activities above the light duty level. He deferred any analysis or assessment of disability due to his psychiatric condition to a psychiatrist.

Dr. Liss also testified that employee's history and medical records indicated that he suffered from pre-existing depressive disorder and ADD. Dr. Liss concluded that employee's ADD, congenital disorder, was unrelated to the accident but complicated his ability to deal with his disability. Dr. Liss testified that the ADD was something that employee had been dealing with since childhood. Dr. Liss opined attention deficit does interfere with concentration, organization, focus and ability to be efficient.

Ms. Gonzalez described how employee's mental conditions combine with his physical conditions to eliminate him from consideration for all levels of work exertion. Ms. Gonzalez noted that employee had a significant psychiatric history of severe depression, panic disorder, anxiety, and ADHD. She opined that his psychiatric disorders preclude tolerating work stresses, maintaining attention and concentration, and interacting appropriately with co-workers and the public. She also testified that employee's history of carpal tunnel syndrome would play a role in keeping employee from being employable, specifically if he were required to do repetitive work. Ms. Gonzalez concluded the combination of his injuries and psychiatric impairments preclude competitive employment.

The evidence supports Dr. Volarich's opinion that employee suffered a 30% permanent partial disability to the body as a whole due to his primary injury. This rating accounted for employee's neck pain, lost motion and ongoing headaches. Therefore, we find that employee suffered a 30% permanent partial disability to the body as a whole referable to the cervical spine as a result of his February 22, 2002 work injury.

Conclusion

Based on the foregoing, the Commission concludes and determines that the combination of employee's pre-existing disabilities and his work-related injury render employee permanently and totally disabled. Employee suffered 30% permanent partial disability due to his primary injury. We find employee suffered the following pre-existing disabilities: 15% permanent partial disability referable to each wrist; 25% permanent partial disability due to attention deficit disorder; and 10% permanent partial disability due to depression and anxiety.

Given that employee's permanent partial disability rate and permanent total disability rate are the same, the Second Injury Fund is not responsible for any differential for 120 weeks beginning January 7, 2003. Thereafter, employee shall receive permanent total disability benefits from the Second Injury Fund in the weekly amount of \$321.14 for the remainder of his lifetime, or until as modified by law.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued December 11, 2006, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 25th day of July 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Johnny Bradshaw

Injury No.: 02-016782

Dependents: N/A

Before the
Division of Workers'
Compensation

Employer: Ree's Contract Service (Settled)

Department of Labor and Industrial

Additional Party:

Second Injury Fund Relations of Missouri
Jefferson City, Missouri

Insurer: Indemnity Ins. Co. of North America (Settled)

Hearing Date:

September 12, 2006 Checked by: JED:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: February 22, 2002
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee injured neck while climbing/trimming trees and reaching overhead.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: cervical spine; depression, anxiety
14. Nature and extent of any permanent disability: Permanent total disability against Employer (Settled)
15. Compensation paid to-date for temporary disability: \$9,218.08
16. Value necessary medical aid paid to date by employer/insurer? \$27,890.61

Employee: Johnny Bradshaw

Injury No.: 02-016782

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$321.14/\$321.14
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

Permanent total disability from Employer (Settled)

22. Second Injury Fund liability: No

TOTAL: -0-

23. Future requirements awarded: None

Said payments to begin N/A and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Johnny Bradshaw

Injury No.: 02-016782

Dependents: N/A

Employer: Ree's Contract Service (Settled)

Additional Party: Second Injury Fund

Insurer: Indemnity Ins. Co. of North America (Settled) Checked by: JED:tr

Before the
Division of Workers'
Compensation
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

This case involves two separate Claims for Compensation with injuries resulting to Claimant on February 22, 2002 (cervical fusion/psychiatric) and April 12, 2002 (bulging lumbar disc). These two claims may be referred to hereafter as the "first" and "second" cases, respectively/chronologically. Employer/Insurer previously settled its risk of liability in each case. Second Injury Fund All parties are represented by counsel.

The single issue for trial is the liability of the SIF in each case, if any.

FINDINGS OF FACT

Stipulations

The parties stipulated that Claimant's applicable compensation rates are \$321.14 for both TTD and PPD benefits and, further, that these rates apply in each of the two Claims herein.

The parties further stipulate Employer paid TTD and medical benefits in the first case but paid no benefits in the second case.

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Dispositive Evidence

Background

In the first case, Claimant sustained severe neck injury with right-sided radiculopathy and attendant psychiatric disability due to chronic pain and anxiety relating to underemployment (and resulting financial distress). (One week prior to this case, Claimant apparently injured his neck trimming trees but that case is not presented here today for adjudication and is merely part of the medical history.)

In the second case, less than two months after the first and prior to the cervical fusion, Claimant sustained a low back injury diagnosed as an aggravation of degenerative lumbar disc disease and noting disc bulge at the L5-S1 level. No interim benefits were paid on this case.

Claimant settled both Claims with Employer on March 23, 2006 (Exhibit N).

Treatment Records

Neck Injury (First Case)

It is unclear when Claimant first treated his neck injury from February 22, 2002.

Claimant treated with Dr. Galatz on May 1, 2002 for persistent right upper extremity symptoms and cervical symptoms (from the first case). He was prescribed physical therapy for the right arm and a subsequent MRI revealed C6-7 disc herniation. After consultation with two surgeons, cervical fusion with instrumentation occurred on August 9, 2002. Claimant never worked full-time again after his neck surgery.

Claimant's cervical disc surgery occurred in August 2002 (four months after the second accident) and the residual pain syndrome mushroomed into a psychiatric disability first diagnosed by Dr. Guiley in August 2003 (by the surgeon) and in January 2004 by Dr. Openlander (below). No other causation evidence was offered other than the disabling pain and anxiety (from the accompanying financial worry due to his ongoing under-employment) was due to injury from the first accident.

The first treatment record of Dr. Openlander states: "First visit for married, underemployed gentleman suffering from chronic pain condition related to neck surgery." This note is dated January 21, 2004.

No notable treatment evidence was offered regarding the second case (involving the low back). No treatment of the low back in the second case is referenced by Dr. Volarich in either his narrative report or his deposition.

Pre-Existing Disabilities

Significant pre-existing disabilities include bilateral operated carpal tunnel syndrome (CTS) in 1996, which Dr. Volarich assigned a fifteen percent PPD bilaterally. In 1975, Claimant sustained a severe right elbow fracture resulting in osteoarthritis which Dr. Volarich assigned a twenty-five percent PPD.

Dr. Liss assigned a twenty-five percent PPD due to attention deficit disorder (ADD) which was apparently based upon a test he administered and was previously undiagnosed, untreated and not otherwise described as a pre-existing disability. Dr. Liss also separated this diagnosis from current psychiatric/psychological disability from depression and anxiety.

It is noted that Dr. Deckert, a chiropractor, provided extended treatment and diagnoses over many years for severe spinal pain, noting low back pain in 1991 (with radiculopathy) and neck and upper back pain in 1997, 1998 and 2001 and spinal manipulations.

Medical Opinion

Dr. Volarich described the February 15, 2002 incident (preceding the first case) as a chiropractic diagnosis of "scapula problem" and "several weeks off work." The chiropractors record of February 15, 2002 note severe right neck and shoulder pain.

Dr. Volarich assigned thirty percent PPD of the cervical spine in the first case and ten percent PPD of the lumbar spine in the second case.

Dr. Volarich rated Claimant's low back injury from the second case at twenty percent PPD. As stated above, the record lacks any evidence of treatment for this episode. This void is very significant with regard to any PPD rating attributable to the second case.

Dr. Volarich rated the incident on February 15, 2002, one week prior to the first case, at seven and one-half percent PPD despite no lost time from work. Dr. Volarich stated claimant "took several weeks off work" but did not reconcile this statement with Claimant's work appearance on the reported accident date (one week later) in the first case.

Dr. Volarich's disability evaluation limits Claimant to the light duty level. Contrary to the testifying psychiatrist, Dr. Volarich testified "significant disability from psychiatric illness" predated the [reported accidents].

Dr. Liss assigned an [overall] PPD rating of seventy-five percent referable to psychiatric disability which he says is directly related to the neck injury. He stated the disability is complicated by the ADD diagnoses. (The SIF interposed a valid *Seven Day Rule* objection precluding Dr. Liss' deposition breakdown of his overall PPD rating.)

Dr. Liss' directly stated that, Claimant had "not had any psychiatric illness or major psychiatric/psychological disability" pre-existing the accidents of "February 22, 2003 and April 12, 2002." He also stated that his diagnosis of attention deficit disorder is unrelated to the severe depression and chronic pain syndrome.

Vocational Assessment

Claimant's offered the deposition of Delores Gonzales as an expert of vocational rehabilitation and placement. She found Claimant unemployable. Her testimony has problems:

a. After stating her report reflects her understanding and opinion of the Claimant it is noted that her original report is supplemented one year later with the comments of Mr. Farace, Claimant's current employer and friend. She asserts that she too observed Claimant's shaking a year earlier during the interview and, although even repeating how difficult it was to interview him, nevertheless omitted remarks similar to those of Mr. Farace in her written report.

b. Regarding the reliability of Mr. Farace's supplemental information, she omitted any explanation as to why she thought claimant's friend's uninvestigated deposition remarks were objective and reliable, or proper protocol in either placement evaluation or forensic evaluation. Since presented by deposition, neither the vocational witness nor the ALJ has opportunity to evaluate demeanor. Finally, the defendant SIF is probably entitled to a bias inference derivative of personal friendship and demonstrated concern for Claimant's welfare, especially in the absence of demeanor evidence.

c. She admitted she only saw Claimant once and provided no placement services whatever despite providing self-serving narrative on her placement experience.

d. She enunciated her employability standard of "competitive work arena" which is not the law in Missouri workers' compensations cases.

e. Her report and testimony were devoid of key facts. She had no recall of the circumstance of one of Claimant's post-accident employment terminations (i.e. bookstore). In addition, she had no details of his active (and current) volunteer work setting up the sound system and audio equipment for his church.

f. She described claimant's current employment as "[the] type of work having little or no demand on the worker and contributes little or nothing to the employer or business." This statement is specious and inflammatory. Claimant performs, among other tasks, clerical work and cleaning of bathrooms in a retail establishment. He works part-time for a friend and with no restrictions; it may be easily inferred claimant is trustworthy and able to "mind the store." Presumably, these services are worth Claimant's hourly rate of compensation.

g. Claimant's vocational witness stated several times that Claimant's unemployability depended on his psychiatric component. Indeed, she stressed great difficulty interviewing him. Both the manifestation of severe anxiety (shaking) and the first psychiatric treatments occurred after the 2002 accidents (which were only fifty days apart). This fact is proven by Claimant's admission at trial, Dr. Guiley's records and Dr. Liss' evaluation report. Claimant's psychiatric components did not pre-exist the accidents.

h. She acknowledged, but ignored in her analysis Claimant's possession of Missouri operator's and chauffeur's licenses, each carrying no restrictions. The reader does not know if these are viable employment tools for

Claimant.

i. She failed to mention Claimant's shaking in her report although, as in the first point above, she stressed the difficulty in the interview and she relied upon it in her conclusions of Claimant's unemployability.

j. In her response to whether she administered testing to Claimant, she asserted that Claimant's high school education permitted her to infer "average intelligence." This is a shallow remark but, nevertheless, consistent with the foregoing deficits in her analysis.

k. She testified on direct examination that she performed among other things, "a transferability of skills analysis," but the report section entitled as such, while almost one page in length, contains almost exclusively boilerplate (applicable to any case) with only three sentences pertaining to the examinee. The first is conclusory, the second is mere restatement of his current employment, and the third is redundant of the first statement. This is not analysis.

RULINGS OF LAW

Opinion Evidence

The testimony of Dr. Volarich has limited probative value because of his admissions primarily but also because of foundation deficits and inappropriate fact valuations.

Dr. Volarich PPD rating and statement of lost time for the incident immediately preceding the first case is inaccurate, if not misleading, especially inasmuch as he missed the "severe" neck pain, and undercuts the reliability of his narrative report which the parties stipulated at Claimant's request in the deposition.

Dr. Volarich incorrectly stated and apparently relied upon the notion that Claimant had pre-existing psychiatric illness. This opinion is simply not credible and demonstrates either an unfamiliarity with the facts or a willingness to embellish qualitatively, not merely in degree.

This also undercuts the value of his testimony generally.

Dr. Liss essential testimony is that Claimant's psychiatric disability related to unemployability is derivative of the first case (cervical fusion with resulting depression and anxiety).

Dr. Liss' express separation of the ADD from Claimant's disabling features of depression and anxiety is significant because, in addition to the absence of any pre-accident psychiatric treatment, the ADD diagnosis was the largest pre-existing PPD item assigned by Dr. Liss. SIF liability cannot be based, in either the first or second case, on pre-existing psychiatric PPD.

Ms. Gonzales vocational testimony, taken as a whole, is not probative of Claimant's employability and cannot be fairly characterized as evidence of permanent total disability. Ms. Gonzales' testimony merely parrots probative portions of the other experts. Such practice is generally proscribed. "A testifying expert cannot merely be a conduit of another non-testifying expert." Bruflat v. Mister, 993 S.W.2d 829, 833-834 (Mo.App. 1996). To the extent she repeated the non-treating, testifying experts, the testimony is simply cumulative, with the deficits stated above.

SIF Liability

The current disability in the first case is determined to be forty-five percent PPD of the body referable to the cervical spine (and radiculopathy) (160 weeks) plus an additional thirty-three percent PPD referable to psychiatric PPD (132 weeks). From a medical causation standpoint, it is axiomatic that this disc pathology was still resolving on the on the reported accident date for the second case. It is routine that such cases are kept open and remain

unsettled for a year or more until it is reasonably certain that the employee has reached MMI. In addition, nothing in the record suggests transferable skills to work except perhaps his knowledge of music which was not analyzed for re-employment.

The pre-existing orthopedic PPD was rated by one medical expert, Dr. Volarich. The CTS is determined to be as rated: fifteen percent bilaterally (52.5 weeks). The right upper extremity is determined to be twenty five percent PPD (52.5 weeks). Claimant's pre-existing low back PPD does not meet threshold. Insufficient evidence was presented that the other SIF allegations manifest as hindrances or obstacles to employment. Section 287.220.1 RSMo (2000).

Thus, the record compels a finding that Claimant's extensive pre-existing upper extremity PPD does not statutorily combine with the first case since that case taken alone is found to have resulted in permanent total disability thereby precluding SIF liability. While Claimant is fully ambulatory he continues to treat psychiatrically and his condition warrants serious guarding and precautionary measures.

* * *

In the second case, the current PPD is determined to be seven and one-half percent PPD for aggravation of pre-existing degenerative lumbar disc disease. A *de minimis* treatment record belies a greater finding of PPD on the second case. This amount of PPD does not satisfy the statutory threshold. Section 287.220.1 RSMo (2000).

Conclusion

Accordingly on the basis of the substantial competent evidence contained within the whole record, in the first case, Claimant is found to have sustained permanent total disability as a result of the reported injury of February 22, 2002 alone. Employer settled its case. No liability is found for SIF benefits.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 02-156881

Employee: Johnny Bradshaw

Employer: Ree's Contract Service (Settled)

Insurer: Indemnity Insurance Company of North America (Settled)

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: April 12, 2002

Place and County of Accident: St. Louis County

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence, read the briefs, heard oral argument, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 11, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued December 11, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 25th day of July 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Johnny Bradshaw

Injury No.: 02-156881

Dependents: N/A

Before the
Division of Workers'
Compensation
Department of Labor and Industrial
Second Injury Fund Relations of Missouri
Jefferson City, Missouri

Employer: Ree's Contract Service (Settled)

Additional Party:

Insurer: Indemnity Ins. Co. of North America (Settled)

Hearing Date: September 12, 2006 Checked by: JED:tr

FINDINGS OF FACT AND RULINGS OF LAW

- 1. Are any benefits awarded herein? No

3. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
6. Date of accident or onset of occupational disease: April 12, 2002
7. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
10. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee injured low back while handling cut logs after tree trimmings.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: low back
15. Nature and extent of any permanent disability: 7.5% PPD of the low back (settled)
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Johnny Bradshaw

Injury No.: 02-156881

17. Value necessary medical aid not furnished by employer/insurer? None
19. Employee's average weekly wages: Unknown
19. Weekly compensation rate: \$321.14/\$321.14
20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

30 weeks of permanent partial disability from Employer (Settled)

22. Second Injury Fund liability: No

TOTAL: -0-

23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Johnny Bradshaw

Injury No.: 02-156881

Dependents: N/A

Employer: Ree's Contract Service (Settled)

Before the
Division of Workers'
Compensation
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Indemnity Ins. Co. of North America (Settled) Checked by: JED:tr

This case involves two separate Claims for Compensation with injuries resulting to Claimant on February 22, 2002 (cervical fusion/psychiatric) and April 12, 2002 (bulging lumbar disc). These two claims may be referred to hereafter as the "first" and "second" cases, respectively/chronologically. Employer/Insurer previously settled its risk of liability in each case. Second Injury Fund All parties are represented by counsel.

The single issue for trial is the liability of the SIF in each case, if any.

FINDINGS OF FACT

Stipulations

The parties stipulated that Claimant's applicable compensation rates are \$321.14 for both TTD and PPD benefits and, further, that these rates apply in each of the two Claims herein.

The parties further stipulate Employer paid TTD and medical benefits in the first case but paid no benefits in the second case.

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Dispositive Evidence

Background

In the first case, Claimant sustained severe neck injury with right-sided radiculopathy and attendant psychiatric disability due to chronic pain and anxiety relating to underemployment (and resulting financial distress). (One week prior to this case, Claimant apparently injured his neck trimming trees but that case is not presented here today for adjudication and is merely part of the medical history.)

In the second case, less than two months after the first and prior to the cervical fusion, Claimant sustained a low back injury diagnosed as an aggravation of degenerative lumbar disc disease and noting disc bulge at the L5-S1 level. No interim benefits were paid on this case.

Claimant settled both Claims with Employer on March 23, 2006 (Exhibit N).

Treatment Records

Neck Injury (First Case)

It is unclear when Claimant first treated his neck injury from February 22, 2002.

Claimant treated with Dr. Galatz on May 1, 2002 for persistent right upper extremity symptoms and cervical symptoms (from the first case). He was prescribed physical therapy for the right arm and a subsequent MRI revealed C6-7 disc herniation. After consultation with two surgeons, cervical fusion with instrumentation occurred on August 9, 2002. Claimant never worked full-time again after his neck surgery.

Claimant's cervical disc surgery occurred in August 2002 (four months after the second accident) and the residual pain syndrome mushroomed into a psychiatric disability first diagnosed by Dr. Guiley in August 2003 (by the surgeon) and in January 2004 by Dr. Openlander (below). No other causation evidence was offered other than the disabling pain and anxiety (from the accompanying financial worry due to his ongoing under-employment) was due to injury from the first accident.

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No notable treatment evidence was offered regarding the second case (involving the low back). No treatment of the low back in the second case is referenced by Dr. Volarich in either his narrative report or his deposition.

Pre-Existing Disabilities

Significant pre-existing disabilities include bilateral operated carpal tunnel syndrome (CTS) in 1996, which Dr. Volarich assigned a fifteen percent PPD bilaterally. In 1975, Claimant sustained a severe right elbow fracture resulting in osteoarthritis which Dr. Volarich assigned a twenty-five percent PPD.

Dr. Liss assigned a twenty-five percent PPD due to attention deficit disorder (ADD) which was apparently based upon a test he administered and was previously undiagnosed, untreated and not otherwise described as a pre-existing disability. Dr. Liss also separated this diagnosis from current psychiatric/psychological disability from depression and anxiety.

It is noted that Dr. Deckert, a chiropractor, provided extended treatment and diagnoses over many years for severe spinal pain, noting low back pain in 1991 (with radiculopathy) and neck and upper back pain in 1997, 1998 and 2001 and spinal manipulations.

Medical Opinion

Dr. Volarich described the February 15, 2002 incident (preceding the first case) as a chiropractic diagnosis of "scapula problem" and "several weeks off work." The chiropractors record of February 15, 2002 note severe right neck and shoulder pain.

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Dr. Volarich rated Claimant's low back injury from the second case at twenty percent PPD. As stated above, the record lacks any evidence of treatment for this episode. This void is very significant with regard to any PPD rating attributable to the second case.

Dr. Volarich rated the incident on February 15, 2002, one week prior to the first case, at seven and one-half percent PPD despite no lost time from work. Dr. Volarich stated claimant "took several weeks off work" but did not reconcile this statement with Claimant's work appearance on the reported accident date (one week later) in the first case.

Dr. Volarich's disability evaluation limits Claimant to the light duty level. Contrary to the testifying psychiatrist, Dr. Volarich testified "significant disability from psychiatric illness" predated the [reported accidents].

Dr. Liss assigned an [overall] PPD rating of seventy-five percent referable to psychiatric disability which he says is directly related to the neck injury. He stated the disability is complicated by the ADD diagnoses. (The SIF interposed a valid *Seven Day Rule* objection precluding Dr. Liss' deposition breakdown of his overall PPD rating.)

Dr. Liss' directly stated that, Claimant had "not had any psychiatric illness or major psychiatric/psychological disability" pre-existing the accidents of "February 22, 2003 and April 12, 2002." He also stated that his diagnosis of attention deficit disorder is unrelated to the severe depression and chronic pain syndrome.

Vocational Assessment

Claimant's offered the deposition of Delores Gonzales as an expert of vocational rehabilitation and placement. She found Claimant unemployable. Her testimony has problems:

a. After stating her report reflects her understanding and opinion of the Claimant it is noted that her original report is supplemented one year later with the comments of Mr. Farace, Claimant's current employer and friend. She asserts that she too observed Claimant's shaking a year earlier during the interview and, although even repeating how difficult it was to interview him, nevertheless omitted remarks similar to those of Mr. Farace in her written report.

b. Regarding the reliability of Mr. Farace's supplemental information, she omitted any explanation as to why she thought claimant's friend's uninvestigated deposition remarks were objective and reliable, or proper protocol in either placement evaluation or forensic evaluation. Since presented by deposition, neither the vocational witness nor the ALJ has opportunity to evaluate demeanor. Finally, the defendant SIF is probably entitled to a bias inference derivative of personal friendship and demonstrated concern for Claimant's welfare, especially in the absence of demeanor evidence.

c. She admitted she only saw Claimant once and provided no placement services whatever despite providing self-serving narrative on her placement experience.

d. She enunciated her employability standard of "competitive work arena" which is not the law in Missouri workers' compensations cases.

e. Her report and testimony were devoid of key facts. She had no recall of the circumstance of one of Claimant's post-accident employment terminations (i.e. bookstore). In addition, she had no details of his active (and current) volunteer work setting up the sound system and audio equipment for his church.

f. She described claimant's current employment as "[the] type of work having little or no demand on the worker and contributes little or nothing to the employer or business." This statement is specious and inflammatory. Claimant performs, among other tasks, clerical work and cleaning of bathrooms in a retail establishment. He works part-time for a friend and with no restrictions; it may be easily inferred claimant is trustworthy and able to "mind the store." Presumably, these services are worth Claimant's hourly rate of compensation.

g. Claimant's vocational witness stated several times that Claimant's unemployability depended on his psychiatric component. Indeed, she stressed great difficulty interviewing him. Both the manifestation of severe anxiety (shaking) and the first psychiatric treatments occurred after the 2002 accidents (which were only fifty days apart). This fact is proven by Claimant's admission at trial, Dr. Guiley's records and Dr. Liss' evaluation report. Claimant's psychiatric components did not pre-exist the accidents.

h. She acknowledged, but ignored in her analysis Claimant's possession of Missouri operator's and chauffeur's licenses, each carrying no restrictions. The reader does not know if these are viable employment tools for Claimant.

i. She failed to mention Claimant's shaking in her report although, as in the first point above, she stressed the difficulty in the interview and she relied upon it in her conclusions of Claimant's unemployability.

j. In her response to whether she administered testing to Claimant, she asserted that Claimant's high school education permitted her to infer "average intelligence." This is a shallow remark but, nevertheless, consistent with the foregoing deficits in her analysis.

k. She testified on direct examination that she performed among other things, "a transferability of skills analysis," but the report section entitled as such, while almost one page in length, contains almost exclusively boilerplate (applicable to any case) with only three sentences pertaining to the examinee. The first is conclusory, the second is mere restatement of his current employment, and the third is redundant of the first statement. This is not analysis.

RULINGS OF LAW

Opinion Evidence

The testimony of Dr. Volarich has limited probative value because of his admissions primarily but also because of foundation deficits and inappropriate fact valuations.

Dr. Volarich PPD rating and statement of lost time for the incident immediately preceding the first case is inaccurate, if not misleading, especially inasmuch as he missed the "severe" neck pain, and undercuts the reliability of his narrative report which the parties stipulated at Claimant's request in the deposition.

Dr. Volarich incorrectly stated and apparently relied upon the notion that Claimant had pre-existing psychiatric illness. This opinion is simply not credible and demonstrates either an unfamiliarity with the facts or a willingness to embellish qualitatively, not merely in degree.

This also undercuts the value of his testimony generally.

Dr. Liss essential testimony is that Claimant's psychiatric disability related to unemployability is derivative of the first case (cervical fusion with resulting depression and anxiety).

Dr. Liss' express separation of the ADD from Claimant's disabling features of depression and anxiety is significant because, in addition to the absence of any pre-accident psychiatric treatment, the ADD diagnosis was the largest pre-existing PPD item assigned by Dr. Liss. SIF liability cannot be based, in either the first or second case, on pre-existing psychiatric PPD.

Ms. Gonzales vocational testimony, taken as a whole, is not probative of Claimant's employability and cannot be fairly characterized as evidence of permanent total disability. Ms. Gonzales' testimony merely parrots probative portions of the other experts. Such practice is generally proscribed. "A testifying expert cannot merely be a conduit of another non-testifying expert." Bruflat v. Mister, 993 S.W.2d 829, 833-834 (Mo.App. 1996). To the extent she repeated the non-treating, testifying experts, the testimony is simply cumulative, with the deficits stated above.

SIF Liability

The current disability in the first case is determined to be forty-five percent PPD of the body referable to the cervical spine (and radiculopathy) (160 weeks) plus an additional thirty-three percent PPD referable to psychiatric PPD (132 weeks). From a medical causation standpoint, it is axiomatic that this disc pathology was still resolving on the on the reported accident date for the second case. It is routine that such cases are kept open and remain unsettled for a year or more until it is reasonably certain that the employee has reached MMI. In addition, nothing in the record suggests transferable skills to work except perhaps his knowledge of music which was not analyzed for re-employment.

The pre-existing orthopedic PPD was rated by one medical expert, Dr. Volarich. The CTS is determined to be as rated: fifteen percent bilaterally (52.5 weeks). The right upper extremity is determined to be twenty five percent PPD (52.5 weeks). Claimant's pre-existing low back PPD does not meet threshold. Insufficient evidence was presented that the other SIF allegations manifest as hindrances or obstacles to employment. Section 287.220.1 RSMo (2000).

Thus, the record compels a finding that Claimant's extensive pre-existing upper extremity PPD does not statutorily combine with the first case since that case taken alone is found to have resulted in permanent total disability thereby precluding SIF liability. While Claimant is fully ambulatory he continues to treat psychiatrically and his condition warrants serious guarding and precautionary measures.

* * *

In the second case, the current PPD is determined to be seven and one-half percent PPD for aggravation of pre-existing degenerative lumbar disc disease. A *de minimis* treatment record belies a greater finding of PPD on the

second case. This amount of PPD does not satisfy the statutory threshold. Section 287.220.1 RSMo (2000).

Conclusion

Accordingly on the basis of the substantial competent evidence contained within the whole record, in the second case, Claimant sustained a seven and one-half percent PPD as a result of the reported injury of April 12, 2002. Employer settled its case. No liability is found against the SIF.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation